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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. .

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The appellant, Interstate Commerce Commission (hereinafter "the Commission"), appeals from the judgment of the United States District Court for the Southern District of New York, entered on December 23, 1955, setting aside and enjoining enforcement of certain orders of the Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The majority opinion of the three-judge District Court for the Southern District of New York, on the plaintiff's application for preliminary injunction, is reported at 134 F. Supp. 132. That publication inadvertently admitted the dissenting opinion of Circuit Judge Hincks, filed at the same time, which opinion is set forth at page 30 in the "Separate Appendix to Statement as to Jurisdiction" filed in this Court by Alleghany Corporation in No. 692.

The opinion of the District Court granting a permanent injunction is not yet reported, but copies of it and of the Court's supplemental opinion are set forth as appendices to Alleghany Corporation's Jurisdictional Statement in No. 692, as are copies of the final judgment entered on December 23, 1955, and of the order of January 27, 1956, denying motions for a new trial.

Also involved in this appeal are four Commission decisions: one of them, in Finance Docket No. 14692, is reported at 261 I.C.C. 239; two of them, in Finance Docket No. 18656, are reported at 290 I.C.C. 725 and 295 I.C.C. 11; the fourth, in Finance Docket No. 18866, is not reported, but all of these reports are set forth in the "Separate Appendix" to Alleghany Corporation's Jurisdictional Statement in No. 692.

JURISDICTION

This suit was brought under 28 U.S.C. 1336 to set aside and enjoin the enforcement of certain orders of the Commission. The judgment of the

District Court was entered on December 23, 1955, a motion for new trial was denied by order entered January 27, 1956, and the Commission's notice of appeal was filed in the District Court on March 26, 1956.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following cases: *United States* v. *Marshall Transport Co.*, 322 U. S. 31; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Baltimore & Ohio R. Co.* v. *United States*, 264 U. S. 258.

QUESTIONS PRESENTED

1. Whether, in approving a merger of two companies already controlled by New York Central and through it by Alleghany Corporation, the Commission was authorized by Section 5(3) to provide that Alleghany Corporation should be considered as a carrier for specified purposes.

2. Whether the district court erred in holding that the Commission's conclusion that Alleghany Corporation controlled New York Central could not stand because

(a) neither the Commission's findings nor the evidence support that conclusion; and

(b) the Commission failed to hold a hearing as to whether such control existed.

3. Whether the district court erred in holding that the acquisition by a person not a carrier of control of an integrated railroad system which is composed of two or more railroad companies, in-

volves an acquisition by such person of two or more carriers which requires approval of the Commission under Section 5(2).

4. Whether a three-judge court convened under the Urgent Deficiencies Act (28 U.S.C. 1336, 1337, 2321-2325) possesses jurisdiction to enjoin an asserted violation of the Investment Company Act (15 U.S.C. 80a).

5. Whether the district court erred in setting aside the Commission's orders determining that Alleghany should be considered as a carrier pursuant to Section 5(3) and authorizing its issuance of new preferred stock.

STATUTES INVOLVED

Sections 5(2)(a)(i), 5(2)(b), 5(3), and 20a(2) of the Interstate Commerce Act (hereinafter "the Act") are set forth in Appendix A hereto.

STATEMENT

By application filed with the Commission on September 17, 1954 (Finance Docket No. 18656), the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter "Big Four"), the Louisville & Jeffersonville Bridge Company (hereinafter "Bridge Company"), the New York Central Railroad Company (hereinafter "Central"), and the Alleghany Corporation (hereinafter ("Alleghany") jointly applied to the Commission under Section 5(2) of the Act for approval and authorization, *inter alia*, of: (a) merger of the properties and franchises of Bridge Company into Big Four; (b) acquisition by Central and Alleghany, by virtue

of their control of Big Four, of control of the properties of Bridge Company; and (c) continuation of Alleghany's status as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act.[1]

Appellee Breswick & Company, alleging itself to be a stockholder in Alleghany, petitioned the Commission for leave to intervene in the merger proceeding. Its petition was denied by Division 4 of the Commission, but subsequently was granted by the entire Commission on reconsideration along with a similar petition by appellee Phillips. The Commission denied, however, the request of these parties for an evidentiary hearing on the application.

On March 2, 1955, the Commission, Division 4, issued its report, 290 I.C.C. 725. After lengthy consideration of the application and the questions involved, the Division set forth (on p. 747) its findings, of which those now pertinent are (a) that the proposed merger of Bridge Company into Big Four, and continuation of control by Central and Alleghany of the properties and franchises of Bridge Company through their ownership of the stock of Big Four, would be consistent with the public interest; and (b) that Alleghany "shall be considered as a carrier" subject to specified provisions of the Act. The report was accompanied by an appropriate order. On May 24, 1955, the entire Commission issued its report on reconsider-

[1] These provisions relate to reporting and accounting requirements and to the issuance of securities.

ation, 295 I.C.C. 11, and an order, which affirmed the order of March 2, 1955 (by Division 4), thus giving final administrative approval to the proposed merger and to Alleghany's status as a carrier subject to the named provisions of the Act.

Meanwhile, in February, 1955, Alleghany had applied to the Commission (Finance Docket No. 18866) for authority to issue new 6% convertible preferred stock in exchange for outstanding 5½% Series A preferred stock, at the option of the holders of the latter class of stock. The Commission, Division 4, issued its report on May 21, 1955, together with an order authorizing issuance of the securities as proposed. Appellees' petition for reconsideration was denied by order of the entire Commission on June 22, 1955.

On June 6, 1955, appellees filed their complaint in the district court, naming the United States and the Commission as defendants, and seeking to have the court set aside the Commission's orders of March 2 and May 24, 1955, in Finance Docket No. 18656 (and the related Finance Docket No. 14692), insofar as those orders directed that Alleghany be "considered as a carrier" subject to named provisions of the Act. On June 23, after learning of the Commission's final order of June 22 in Finance Docket No. 18866 (authorizing issuance of the securities), appellees applied for and obtained a temporary restraining order, halting Alleghany's distribution of the new preferred stock (after more than half of it had been issued and exchanged for old stock). When the restraining order was issued,

Alleghany was not a party to the suit, but it was later permitted to intervene as a defendant.

On July 21, 1955, after a hearing on appellee's application for an interlocutory injunction, the court (Circuit Judge Hincks dissenting) filed its opinion, 134 F. Supp. 132, and on July 26 entered its order granting an interlocutory injunction. The case was argued on its merits on two days in September, the court's opinion was filed on November 18, 1955, and its judgment was entered on December 23, 1955, setting aside and permanently enjoining the Commission's orders of March 2 and May 24, 1955, in Finance Docket No. 18656, except insofar as those orders approved the merger of the Bridge Company into Big Four, and its orders of May 26 and June 22, 1955, in Finance Docket No. 18866. The reasons assigned by the court for voiding the orders are hereinafter summarized.

On January 27, 1956, the court entered an order denying motions filed by Alleghany and other defendants for new trial and reconsideration. The Commission's notice of appeal was filed in the district court on March 26, 1956.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of great importance to railroads and to all other carriers subject to regulation under the Interstate Commerce Act as well as to the Commission itself in its administration of the Act.

1. In the *Bridge* case, the Commission determined that pursuant to Section 5(3) Alleghany

should be considered as a carrier subject to specified provisions of the Act, including Section 20a relating to the issuance of securities. Section 5(3) provides that when a person not a carrier is authorized by an order of the Commission under Section 5(2) to acquire control of any carrier or of two or more carriers, such person shall, to the extent provided by the Commission, be considered as a carrier subject to enumerated provisions of the Act.[2]

The Commission found that Alleghany controlled New York Central (a carrier) and that under *United States* v. *Marshall Transport Co.*, 322 U.S. 31, Alleghany was a necessary party to the application for approval of the merger of Bridge Company into Big Four and must obtain the Commission's approval under Section 5(2) for such modification of its ultimate control of the Bridge Company. Incident to approving the proposed modification of Alleghany's control of the Bridge Company, the Commission determined that Alleghany should be considered as a carrier subject to the provisions of Section 20(1) to (10) and Section 20a (2) to (11).

The district court held that since Alleghany had indirect control of the Bridge Company both be-

---

[2] When paragraphs (2) and (3) of Section 5 are read together, it is apparent that paragraph (3) comes into play only in acquisitions of control which require the Commission's approval under paragraph (2), i.e., when a non-carrier which controls one or more carriers acquires control of another carrier, or where a non-carrier which did not previously control any carrier acquires control of two or more carriers.

fore and after that company's merger with Big Four, there was involved in the merger no new acquisition of control to which Alleghany was a necessary party within the meaning of the *Marshall Transport* case. In the *Marshall Transport* case, this Court held that where non-carrier corporation A controls carrier B which acquires the properties of carrier C, A is a necessary party to an application for approval of the acquisition under Section 5(2). However, it is undisputed that the merger of the Bridge Company into Big Four required the Commission's approval under Section 5(2), notwithstanding the fact that Big Four already owned all of the Bridge Company's stock, and the district court sustained that portion of the Commission's order in Finance Docket No. 18656 which approved the merger. The Commission has held, although not consistently, that the immediate parent company of two subsidiary companies which it is proposed to merge, is a necessary party to an application for approval of such merger under Section 5. *Standard Freight Lines—Merger*, 40 M.C.C. 41; *Scott Bros.—Merger*, 45 M.C.C. 196. If the immediate parent is a necessary party to an invocation of the public interest standard of Section 5(2), it is clearly arguable that an indirect parent (such as Alleghany through its control of New York Central) is likewise a necessary party so that the impact of its other corporate affiliations upon the proposed merger may be taken into account in the Section 5(2) determination.

The same question will continue to arise in other proceedings under Section 5. Accordingly, it is clear that a resolution by this Court of the question whether an indirect parent (such as Alleghany) corporation is a necessary party to a Section 5 transaction involving its subsidiaries, is needed for the guidance of the Commission in administering Section 5.

2. The Court held further that the Commission's conclusion that Alleghany controlled Central could not be sustained because it was not supported either by the Commission's findings or by the evidence, and because the Commission had failed to grant appellees' request for an evidentiary hearing on the question whether such control existed. As to the first of these reasons, the Commission stated in its report (295 I.C.C. 16):

> The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors who permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central.

Whether the district court erred in completely disregarding the above-quoted findings and con-

clusions of the Commission on the question of control is of importance in view of previous judicial decisions to the effect that section 5 of the Act "confers broader authority and greater administrative discretion [on the Commission] than most any other section of the Act." *Wiley & Sons* v. *United States*, 85 F. Supp. 542, 545, aff'd. 338 U.S. 902. Also see *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87.

The question whether the Commission should have conducted an evidentiary hearing likewise calls for an answer by this Court. Section 5(2)(b) provides that *if the Commission "shall consider it necessary* in order to determine" whether the statutory findings may properly be made, "it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved *unless the Commission determines that a public hearing is not necessary in the public interest.*" (Emphasis supplied)

The Commission, construing the quoted provision as vesting it with discretion whether to order a hearing, *Wiley & Sons* v. *United States, supra,* determined that a public or evidentiary hearing was not necessary in the public interest. It said in its report (295 I.C.C. 12):

> For the reason that the intervenors [appellees] are concerned primarily with the interpretation of paragraphs (2) and (3) of section 5 of the Act, and their application to the facts disclosed in these proceedings, it is our

opinion that there is no need to order a hearing.

Looking to the provision of Section 17(3) of the Interstate Commerce Act, that Commission hearings shall be public upon the request of any party, the district court concluded that the hearing provisions of Section 5(b)(2) and 17(3), read together, distinguish between public and "non-public" hearings, and that the Commission should have accorded the appellees a "non-public" hearing. We contend, to the contrary, that the Commission's power under Section 5(2)(b) to determine whether a public hearing is necessary in the public interest is not subject to the novel requirement that the Commission must at least conduct a secret or "non-public" hearing. In any event, whether and to what extent the Commission is required to hold hearings in control or merger proceedings under section 5, and to what extent, if at all, it may exercise its discretion in such matters, obviously are questions of substantial public importance.

3. Perhaps the most important question presented by this appeal is whether the district court erred in holding (contrary to the Commission) that the acquisition by a person not a carrier (Alleghany) of control of an integrated railroad system (Central), which is composed of two or more railroad companies, involves an acquisition by such person of control of two or more carriers, and is a transaction which requires Commission

approval under section 5(2). This question is pointed up by the fact that Alleghany alleged, and the Commission found, that Alleghany (then a non-carrier) had in May 1954 acquired control of Central, but had not sought, nor had the Commission entered, any order approving such control. Because the Central "system" includes a number of separate corporations which engage in rail transportation, the district court held that a Commission order under Section 5(2) approving Alleghany's control of Central was a prerequisite to the Commission's assuming jurisdiction under Section 5(3) to order that Alleghany "be considered as a carrier" subject to the provisions governing issuance of securities; and that, absent such an order under section 5(2), the "status" order under section 5(3) and the subsequent order under section 20a authorizing issuance of securities were both void.

The Commission's position, as stated in its report (295 I.C.C. 11, 15), is that Central, the parent company comprised of several railroads and railroad systems, had been recognized by the Commission "as an integrated unit" at least as early as 1929, and in another decision in 1952; also that "the same executives serve Central and the subsidiary companies, and the carriers of the system have interlocking directorates. When Alleghany, by stock ownership and by the favorable action of the stockholders, acquired control of Central, all the properties within the carrier's orbit were under long established single operating control."

As additional reasons for its conclusion, the Commission stated (295 I.C.C. 16):

> To give section 5 an interpretation which would require our approval each time stockholders decide to change directors of established system properties, or to elect new officers, and, consequently, to install new management would have a tendency to set in motion within the organizations contending forces which might well impair or destroy the results of legitimate integration. Although Congress has subjected the merging of railroad properties in many respects to regulation in order to prevent abuses and to protect the public interest, we do not believe it intended for section 5 to be construed in a way that might produce undesirable results. Our interpretation of this section is to the contrary.

Stated otherwise, the question is whether Congress intended to empower the Commission to veto the choice of management made by the stockholders of an integrated railroad system (leaving aside problems of interlocking directors and control of separate carriers which are not involved in this case).

Merely to state, as above, the reasons for the Commission's conclusion on this point should be sufficient, we believe, to demonstrate the substantial nature and extreme importance of the question presented by the district court's complete reversal of that conclusion.

4. The remaining question is whether the three-judge district court, convened under the Urgent Deficiencies Act (28 U.S.C. 1336, 1337, 2321-2325), had jurdisdiction to enjoin an asserted violation of the Investment Company Act (15 U.S.C. 80a). Under the former Act such a court is limited to "jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; *Pittsburgh & West Va. Ry. Co.* v. *United States,* 281 U. S. 479. In the instant case, the district court not only set aside the Commission's orders; it enjoined Alleghany from proceeding with the preferred stock exchange. Obviously, the court's conclusion that the Commission lacked jurisdiction to authorize the issuance of the new preferred stock did not preclude Alleghany from issuing it without such approval; it simply meant that Commission approval was not required. Thus, the injunction against Alleghany necessarily rested upon an asserted violation of the Investment Company Act. Whether the statutory three-judge district court had jurisdiction thus to enjoin an alleged violation of the Investment Act is, we submit, a question which should be determined by this Court.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are so substantial

and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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General Counsel.

LEO H. POU,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

MAY 1956.

APPENDIX A

Statutes Involved

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, are as follows:

> Sec. 5(2)(a). It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *
>
> * * * * * *
>
> Sec. 5(2)(b). Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Com-

mission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed

will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * * * *

Sec. 5(3). Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20(1) to (10), inclusive, of this part, sections 204(a)(1) and (2) and 220 of Part II, and section 313 of part III, [which relate to reports, accounts, and so forth, of carriers], and section 20a (2) to (11), inclusive, of this part, and section 214 of part II [which relate to issues of securities and assumptions of liability of carriers], including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service,

and that it is otherwise consistent with the public interest.

* * * * *

Sec. 20a(2). From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities or any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION *et. al.*,
Appellants,

v.

BRESWICK & CO., *et. al.*, as Common Stockholders of Alleghany Corporation, etc.,
Appellees.

No. 82

BAKER, WEEKS & CO., *et. al.*,
Appellants,

v.

BRESWICK & CO., *et. al.*,
Appellees.

No. 114

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BRESWICK & CO., *et. al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

Appellees present their petition for a rehearing of the above entitled causes, and, in support thereof, respectfully show:

Preliminary Statement

By way of preliminary clarification, appellees state that appellees did not challenge the Interstate Commerce Commission's jurisdiction over the merger and lease transactions herein in so far as it applied to the applicants other than Alleghany Corporation. We make this statement in view of the Court's observation that "Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress", etc. (Slip op., pp. 18-19).

Grounds for Rehearing

Appellees petition for rehearing on the following grounds:

I

The Court ignores the "public interest" standard.

The majority states (slip op., p. 9):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'
>
> The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers

to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved.' "

This ruling ignores the statutory command that an order may issue under § 5(2) *only* if found to be "consistent with the public interest". Thus the majority now would read the statute to make it provide that it is "consistent with the public interest" for Alleghany Corporation, "a person which is not a carrier and which has *unlawful* control of one or more carriers to acquire control of another carrier." We respectfully submit that there is no justification for giving Alleghany Corporation the benefit of such a novel construction of the statute.

The District Court held in its undisturbed finding that Alleghany has unlawful control of Central. Thus, Alleghany has no lawful means of acquiring control of Jeffersonville, for it lacks lawful power to contract for the acquisition by Central of control of Jeffersonville.

The effect of the majority opinion is to permit Alleghany to use its unlawful control of Central for self-aggrandizement, and to deprive Alleghany's stockholders of protections enacted for their benefit by the Congress in the Investment Company Act. Neither result can conceivably be "consistent with the public interest."

Since it is discretionary with the I.C.C. whether to impose carrier status on a non-carrier pursuant to § 5(3), *Warrior & Gulf Navig. Co.*, 250 I.C.C. 26, the majority opinion holds in effect that it is not an abuse of discretion to reward a law violator with the protection of I.C.C. jurisdiction despite the "public interest" standard, a result which, we respectfully suggest, is plainly untenable.

"It is well settled that the courts will refuse to lend their assistance to a party seeking enforcement of a contract entered into in violation of existing law de-

spite the fact that the defendant also participated in the wrongdoing. (*McMullen* v. *Hoffman*, 174 U. S. 639; *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227; *Carrier* v. *Carrier*, 226 N. Y. 114.) The reason for the rule is obvious. Were the court to entertain such an action it would be aiding in the violation of an existing law. The courts therefore 'will not stir a step in aid of an illegal scheme'. (*Carrier* v. *Carrier, supra*, p. 123.)"

* * *

"Moreover considerations of public policy require that aid be denied to one seeking to enforce a contract entered into in defiance of law. Were the courts to lend their assistance to the enforcement of such agreements disrespect of law would be engendered and violations of law multiplied." (*Toll* v. *Friedman*, 272 App. Div. (N. Y.) 587 (1947), pp. 589-590)

II

This Court rejected the present majority ruling in the *Marshall Transport case.*

The holding made by the District Court "would mean" the majority states, "that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction" (Slip op. p. 9). Yet in the very next sentence the majority stated: "Remedies against a violator are provided by § 5 (7), (8) and (9) of the Act" (op. pp. 9-10). Thus the opinion turns on the finding that "To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic" (op. p. 10). But this is precisely what the Commission did, as this Court, including Justice Frankfurter of the present majority, held it was *required* to do in *United States* v. *Marshall Transport Co.*, 322 U. S. 31.

There, Union, a non-carrier in control of the carrier, Refiners, violated the fifth clause of §5 (2)(a)(i) by refusing to file an application to acquire control, through Refiners, of a second carrier, Marshall. This Court affirmed the I.C.C. ruling that the violation of the fifth clause required dismissal of the 5 (2) application and denial of I.C.C. jurisdiction.

Here, under the undisturbed District Court finding, which the majority states "We need not decide," Alleghany, a non-carrier, violated the fourth clause of the same section by refusing to file an application to acquire control of the 2 or more carriers in the 73 carrier Central System, a violation which compels the opposite result here if this Court is to be consistent with the Court's 8 to 1 decision in *Marshall*, per Chief Justice Stone.

Thus, if the first acquisition by a non-carrier of a carrier is lawful and the second unlawful, the Commission is deprived by this Court of jurisdiction over the non-carrier violator, but if the first acquisition is unlawful and the second lawful, the Commission is *not* deprived of such jurisdiction. Under the majority opinion jurisdiction would thus depend upon the priority of the offense and not upon its substance. Not only would the violation not be dealt with at its inception, it would receive the benediction of the Court.

III

The Court erred in finding that there was "a significant increase" in Big Four's "power" of control over Jeffersonville.

Turning to the question of whether Alleghany "acquired control" of Jeffersonville, the majority states:

> "• • • In deciding this type of issue, of course, the finding of the Commission that a given transaction does or does not constitute a significant increase in

the power of one company over another is not to be overruled so long as 'there is warrant in the record for the judgment of the expert body * * *' Rochester Tel. Corp. v. United States, 307 U. S. 125, 146, 83 L. Ed. 1147, 1161, 59 S. Ct. 754." (Slip op. p. 17)

* * *

"The merger of the Jeffersonville into the Big Four virtually precludes any change in the relation of the Jeffersonville lines to the Central System. The Jeffersonville will be no more. In view of this it cannot reasonably be said that there has been no increase in the power of the Big Four, the Central, and, through its relation with them, Alleghany over the Jeffersonville. While it is not always profitable to analogize 'fact' to 'fiction' La Fontaine's fable of the crow, the cheese, and the fox demonstrates that there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach.

"* * * We hold that the Commission was justified in finding that the merger of the Jeffersonville into the Big Four involved an 'acquisition of control' of the Jeffersonville by Central and Alleghany within the meaning of § 5(2) of the Act." (op. p. 18)

In support of its opinion the Court cites the *New York Central Securities Case,* 287 U. S. 12. But it seems to have overlooked the fact that there was an increment of control in that case, the previously uncontrolled interests of minority stockholders outside the System having been involuntarily transmuted into the status of lessors. Central thus acquired from them rights as lessee which increased the amount of its control. Here no interests outside the System were acquired by anyone.

Under the majority's opinion a person owning and controlling 100% of a property makes an "acquisition of

control'' when he changes the form of ownership and re-emerges with 100% ownership and control. The Jeffersonville assets, unlike the corporate vehicle through which they were held, are physical in nature. Nothing in the record now ''virtually precludes'' the 100% owner of these physical assets from selling them, or for example, from assigning the trackage rights to a person outside the system, any more than the same 100% owner was ''virtually precluded'' from doing these things before the merger. True it is that ''The Jeffersonville will be no more.'' But that refers to the corporate envelope or form, not to its contents or assets. These are just as extant and real after the merger as they were before.

To hold, as the majority does, that the merger has resulted in ''a significant increase in the power'' of the owner over the assets by virtue of the merger disregards the legal, financial and corporate facts of the transaction, a proposition equivalent to saying that the owner of a letter acquires control over it after he destroys the envelope. And we are are constrained to ask, what specific ''control'' has the Big Four ''acquired'' that it did not have before? If anything, the owner by dissolving Jeffersonville's corporate form has *less than he had before.* Certainly the Jeffersonville assets are not now less accessible to the will of the 100% owner than they were before the merger. The owner may re-create the corporate envelope, and restore the assets thereto, or he may sell, assign or otherwise divest the control he now has. We submit that such a rationalization as is used here to justify fulfillment of the ''acquisition of control'' clause of the statute, will not survive a fair re-examination.

IV

The majority erroneously attributes to the I.C.C. a "finding" it did not make.

The majority opinion contains the statement at page 18:

> "* * * We hold that the Commission was justified in finding that the merger of the Jeffersonville into the Big Four involved an 'acquisition of control' of the Jeffersonville by Central and Alleghany within the meaning of § 5(2) of the Act."

The I.C.C. never made such a "finding" either in its opinion or order (See appellees' brief, pp. 84 to 86). Nor did it find, as implied at page 18 of the Court's opinion, that there was "a significant increase in the power" of one company over another. It merely found and approved a "continuation of control", not an "acquisition of control," as a result of the merger. It thus described, on the basis of its administrative expertise, the precise fact found by it, and its recognition that no "acquisition" was involved in the merger. In its opinion the full Commission approved the merger pursuant to the first clause of Section 5(2)(i) which does not refer to "acquisition of control"; and imposed carrier status on Alleghany pursuant to the theory that it was a "necessary party" to the merger application under the *Marshall* case doctrine (R. 514). But the majority opinion does not reflect the actual finding of the Interstate Commerce Commission or the fact that neither its report nor its order at any point authorizes an "acquisition of control". In this connection see the opinion of this Court per Mr. Justice Frankfurter, in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87-8:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

And in *Atchison, Topeka & Santa Fe Railway* v. *U. S.*, 295 U. S. 193, 201, it was stated:

> "Recently the court has repelled the suggestion that lack of express findings by an administrative agency may be supplied by implication."

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment appealed from be affirmed.

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I, George Brussel, Jr., counsel for appellees Breswick & Co. and Myron Neisloss, and I, Randolph Phillips, appellee pro se, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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May 16, 1957.